



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

Rudy Giuliani Presidential Committee  
c/o John Gross, Treasurer  
Proskauer Rose LLP  
1585 Broadway  
New York, NY 10036

**APR 29 2009**

**RE: MUR 5942**

**Dear Mr. Gross:**

On October 1, 2007, the Federal Election Commission notified the Rudy Giuliani Presidential Committee ("Committee"), and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 2, 2009, the Commission found, on the basis of the information in the complaint, and information provided by the Committee, that there is no reason to believe the Committee and you, in your official capacity as treasurer, violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

**Mark Allen**  
Assistant General Counsel

**Enclosure**  
**Factual and Legal Analysis**

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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5 **MUR 5942**

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7 **Respondents:** Rudy Giuliani Presidential Committee, Inc. and John H. Gross,  
8 in his official capacity as treasurer  
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10 **I. INTRODUCTION**

11 The complaint in this matter by Lane Hudson alleges that The New York Times Company  
12 ("The Times") made a corporate contribution to the Rudy Giuliani Presidential Committee, Inc.  
13 ("RGPC"), Mr. Giuliani's principal campaign committee for the 2008 Presidential election, in  
14 connection with the rate The Times charged for a full-page advertisement. The complaint alleges  
15 that RGPC accepted a prohibited in-kind corporate contribution when RGPC paid \$64,575 for its  
16 full-page advertisement in The Times, far below the appropriate rate of \$142,083.

17 Based on available information discussed below, including information provided by  
18 RGPC, the Commission has determined that there is no reason to believe RGPC violated the  
19 Federal Election Campaign Act of 1971, as amended, ("the Act") in this matter.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Background**

22 On Thursday, September 13, 2007, RGPC contacted The Times, asking to run a full-page  
23 advertisement the next day at a price of \$64,575, the same price as another political committee,  
24 MoveOn.org Political Action ("MOPA"), reportedly paid for a full-page advertisement published  
25 in The Times on September 10, 2007.<sup>1</sup> The Times informed RGPC that it could not guarantee

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<sup>1</sup> MOPA's advertisement, titled "General Petraeus Or General Betray Us? Cooking the books for the White House," criticized General David Petraeus on the day of his report to Congress regarding the status of the United States military operations in Iraq. Allegations that MOPA did not pay the appropriate Times rate are the subject of MUR 5939.

1 that the advertisement would run the next day. Rudy Giuliani announced this process on a radio  
2 show. See [http://hughhewitt.townhall.com/talkradio/transcripts/page 6](http://hughhewitt.townhall.com/talkradio/transcripts/page%206). RGPC paid \$64,575 to  
3 The Times through its media vendor, and on Friday, September 14, The Times published the  
4 RGPC advertisement, headed "'The willing suspension of disbelief.' – Hillary Clinton, 9/11/07."  
5 The advertisement contained a disclaimer, "Paid for by the Rudy Giuliani Presidential  
6 Committee, Inc. [www.JoinRudy2008.com](http://www.JoinRudy2008.com)."

7 Later, on September 23, 2007, The Times published an article by Clark Hoyt, The Times'  
8 Public Editor,<sup>2</sup> in which he stated that MOPA should not have been charged the "standby" rate of  
9 \$64,575. Clark Hoyt, *Betraying Its Own Best Interests*, THE NEW YORK TIMES, September 23,  
10 2007. Hoyt described this rate as available to advertisers who are not guaranteed what day their  
11 advertisement will appear, only that it will be in The Times within seven days. According to  
12 Hoyt, because The Times agreed to run MOPA's advertisement on a specific day, Monday,  
13 September 10, 2007, The Times should have charged MOPA a higher rate of \$142,083. Hoyt  
14 quoted Catherine Mathis, vice president of corporate communications for The Times, as  
15 acknowledging "[w]e made a mistake," in that The Times' advertising representative failed to  
16 make it clear to MOPA that for the \$64,575 rate, The Times could not guarantee the Monday,  
17 September 10 placement; the representative, however, left MOPA with the understanding that the  
18 advertisement would in fact run that day. On the same day as the Hoyt article appeared in The  
19 Times, MOPA announced that it would pay \$142,083 for its advertisement, and the committee  
20 did so the following day, September 24, 2007.

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<sup>2</sup> Hoyt's article describes The Times' Public Editor as serving "as the readers' representative. His opinions and conclusions are his own."

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Also on September 24, 2007, the complaint regarding the RGPC advertisement was filed with the Commission. The complaint, citing to the situation regarding MOPA as support, argues that the Times' policy required RGPC to pay the fixed-date rate, and therefore improperly received the "standby" rate for its advertisement because RGPC requested that its advertisement run on a date certain, Friday, September 14, 2007, and the advertisement in fact ran on that date. According to the complaint, RGPC should have paid the same higher rate of \$142,083 that MOPA reportedly paid.

**B. Analysis**

The Act prohibits corporations such as The Times from making contributions in connection with Federal elections,<sup>3</sup> and prohibits political committees such as RGPC from knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a). The term "contribution" includes giving "anything of value" for the purpose of influencing any election for Federal office. 2 U.S.C. §§ 431(8)(A) and 441b(b)(2). The term "anything of value" includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

The provision of goods or services at less than the usual and normal charge for such goods or services is a contribution.<sup>4</sup> *Id.* The Commission's regulations include "advertising services" as an example of such goods and services. *Id.* If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and

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<sup>3</sup> The Times is a corporation organized under the laws of the State of New York.

<sup>4</sup> A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

1 the amount charged the political committee. *Id.* For the purposes of this provision, "usual and  
2 normal charge" for goods means the price of those goods in the market from which they  
3 ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

4 The issue of vendor discounts to political committees has been addressed by the  
5 Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a  
6 vendor to provide a discount to a political committee so long as the discount is made available in  
7 the ordinary course of business and on the same terms and conditions to other customers that are  
8 not political committees or organizations. *See, e.g.,* AOs 2006-1 (PAC for a Change); 1995-46  
9 (D'Amato); 1994-10 (Franklin National Bank).

10 Accordingly, this matter turns on whether the price paid for RGPC's advertisement fell  
11 below The Times' usual and normal charge for that kind of advertisement. *See* 11 C.F.R.  
12 § 100.52(d). The available information indicates that the appropriate charge turns on the  
13 understanding between The Times and RGPC regarding the placement of the advertisement. A  
14 large difference in price depends on whether the parties agreed that the advertisement would run  
15 on a certain date, an "open" arrangement, or whether the advertisement was not guaranteed to run  
16 on a particular day but would run at some point during the next week, a "standby" arrangement.

17 RGPC in its response asserts that it paid the appropriate \$64,575 standby rate for its  
18 advertisement that had no guarantee of being run on any particular day. RGPC resp. at 1. RGPC  
19 provides a sworn affidavit from Patricia W. Heck, president of Crossroads Media LLC, who is  
20 "responsible for overseeing all media placements for the Rudy Giuliani Presidential Committee,  
21 Inc." and has "specific knowledge of the actions undertaken by RGPC with respect to the

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1 advertisement at issue." *Id.* at Exh. B, Heck Aff. at ¶ 1. Ms. Heck avers that she requested the  
2 \$64,575 standby rate for RGPC's advertisement to run on September 14, 2007, even telling The  
3 Times' advertising representative that RGPC did not want to run the advertisement unless it  
4 would run on September 14. *Id.* at ¶¶ 2, 4. The Times' advertising representative, however,  
5 informed Heck that The Times could not guarantee that date. *Id.* at ¶¶ 3, 6.

6 RGPC distinguishes the circumstances of its advertisement from those of MOPA's,  
7 asserting that while the latter's had to run on Monday, September 10, 2007, the day of General  
8 Petraeus' scheduled testimony before Congress, RGPC's own advertisement had no such  
9 constraint: the events it referred to had already taken place and it spoke generally about General  
10 Petraeus' qualifications and thus the advertisement could have run on any day of the seven-day  
11 standby window and would have remained meaningful. RGPC resp. at 2-3.

12 The weight of the available information cuts against a finding of reason to believe in this  
13 matter. In response to the general allegation in the complaint that RGPC should pay the same  
14 higher rate as MOPA, RGPC provided a specific account of an arrangement emphasized as  
15 standby. Further, a standby arrangement by its very nature leaves open the possibility of the

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1 advertisement running on the first of several possible dates, as occurred here. In addition,

2 RGPC's payment of \$64,575 on September 14, 2007, appears to have been timely.<sup>5</sup>

3 In sum, based on the available information, it does not appear that RGPC knowingly  
4 received a corporate contribution in the form of reduced advertising costs. Accordingly, the  
5 Commission finds no reason to believe that Rudy Giuliani Presidential Committee, Inc. and John  
6 H. Gross, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a).  
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<sup>5</sup> On its 2007 October Quarterly Report, RGPC disclosed a \$64,600 payment to Crossroads Media LLC on September 14, 2007 for "media," presumably corresponding to its advertisement that day in The Times. RGPC's media vendor avers that RGPC cut a check for the advertisement and sent it via FedEx on September 13, 2007. RGPC resp. at Exh. B, Heck Aff. at ¶ 8. This payment before the publication of the advertisement appears to be consistent with The Times' "Credit and Payment Terms," which state in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.